COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 2017-00107

COMMONWEALTH

vs.

JASON MCCARTHY
(and a companion case[1])

FINDINGS OF FACT AND RULINGS OF LAW ON DEFENDANTS' MOTIONS TO SUPPRESS

The defendants, Jason McCarthy and Brian Whittemore, seek to suppress all evidence, physical and testimonial, obtained by the Commonwealth on or about February 22, 2017 as a result of a motor vehicle stop in the Town of Barnstable, Massachusetts.[2] Hearings were conducted on January 14, 2019, January 15, 2019 and January 23, 2019, at which time six witnesses appeared and testified: Deputy Chief Sean Balcom, Mr. Brian Egnitz, Deputy Sheriff Kim Saladino, Detective Thomas Chevalier, Detective Mark Butler, and Detective John York. For the following reasons, the defendants' motions to suppress must be **DENIED**.

FINDINGS OF FACT

Eight exhibits were entered into evidence and, based on the credible evidence admitted and the reasonable inferences drawn therefrom, this court makes the following findings of fact.

[1] Commonwealth vs. Brian S. Whittemore, Barnstable Superior Court, Criminal Action No. 2017-00108

[2] McCarthy filed multiple motions to suppress, as well as an amended motion to suppress, containing various arguments, some repeated, some unique. Whittemore joined these motions, and at the hearing, orally moved to suppress his own statements to police. The court addresses all arguments raised by the defendants through any such motion.

Deputy Chief Sean Balcom has been with the Barnstable Police Department for over 30 years, serving for the past 20 years as a trained narcotics investigator. Deputy Chief Balcom has over 750 hours of narcotics training involving, amongst other things, how to utilize confidential informants in connection with drug investigations.

Investigation of the Whittemore Residence

During December, 2016 and January, 2017, Barnstable Police detectives, under the direction of Deputy Chief Balcom, began a drug investigation involving Brian Whittemore, Sr. (hereinafter "Whittemore"), and Brian Whittemore, Jr. (hereinafter "Junior"), who were suspected of distributing heroin from their residence located at 25 Skating Rink Road, Hyannis, Massachusetts (hereinafter the "residence"). Deputy Chief Balcom has known Whittemore for approximately 20 years and has received many complaints from Whittemore's neighbors regarding suspected illegal drug transactions taking place at or near his residence. As a result of recent complaints from neighbors in the fall of 2016, Deputy Chief Balcom and other Barnstable Police detectives conducted surveillance, as well as several controlled buys with confidential informants from the residence. During this time period, Deputy Chief Balcom and other detectives developed information from four confidential informants that Whittemore was distributing heroin from his residence.

On January 11, 2011, after conducting controlled buys with Whittemore using confidential informants, Barnstable police applied for a search warrant for the residence, which was granted. On January 11, 2017, the search warrant for the residence was executed by several detectives and officers of the Barnstable Police Department. As a result of the execution of the search warrant, evidence of drug distribution was found, including scales and baggies. However, no drugs were found at the residence on this date.

Surveillance Identifying McCarthy's Vehicle

Prior to the execution of the search warrant on January 11, 2017, Deputy Chief Balcom and Barnstable Police detectives had been conducting surveillance at the residence. During a surveillance, Deputy Chief Balcom noticed a black Hyundai Tucson with Registration No. 136AB6 appear briefly at the residence. A check with the Registry of Motor Vehicles ("RMV") indicated that the black Hyundai Tucson, Registration No. 136AB6 was registered to a Joyce McCarthy, 200 Weld Street, New Bedford, Massachusetts. Information from a confidential informant indicated that Joyce McCarthy was the mother of Jason McCarthy, who lived with her at the same address. Deputy Chief Balcom conducted a check of the Massachusetts Probation Service and found that Jason McCarthy had over 50 past arraignments involving 30 prior narcotic violations. Sometime after January 11, 2017, Deputy Chief Balcom conducted surveillance at 200 Weld Street, New Bedford, Massachusetts and observed Jason McCarthy leaving that address in a black Hyundai Tucson.

The ALPR System and McCarthy's Vehicle

For approximately the last three and a half years, the Sagamore and Bourne bridges, which provide the only motor vehicle access between the mainland and Cape Cod, have employed the use of automatic license plate recognition ("ALPR") technology. ALPR technology uses bridge camera readers, combined with computer algorithms capable of converting images of license plates to electronically readable data. Brian Egnitz, a civilian employee of the Massachusetts State Police, who has 15 years of experience, serves as a technology project manager. Mr. Egnitz has installed fixed camera readers interfaced with the ALPR system on both sides of the Bourne and Sagamore bridges. These bridge camera readers are governed by the Department of State Police General Order Number TRF-11 (Exhibit #1),

dated July 22, 2014. The Barnstable Police Department has adopted the State Police General Order Number TRF-11 with respect to utilizing ALPR technology during the course of criminal investigations.

Detective John York, a 32 year veteran of the Barnstable Police Department, is one of two Barnstable Police officers who have been given "user credentials" and are authorized to log into the ALPR system. The ALPR system is configured to allow vehicle license plate numbers of interest to be entered on a so-called "Hot List". Vehicles of interest on the Hot List may include stolen vehicles, vehicles associated with Amber Alerts, BE-ON-THE-LOOKOUTS (BOLOS), et cetera. A so-called "hit" is an indication that a license plate from the Hot List matches a record entered into the ALPR database. Once a hit is detected by the ALPR system, an "Alert", either by email or by text message, is sent to authorized users who have been identified on the ALPR system.

The Executive Office of Public Safety and Security ("EOPSS") maintains general oversight and control over the ALPR system. Information which is obtained by the ALPR readers is uploaded to a database located in Chelsea, Massachusetts. EOPSS has established a one year retention period for any information that is captured by the ALPR system. While EOPSS serves as the host for all ALPR data, the State Police maintains the camera readers and hardware used for capturing license plate images on both the Sagamore and Bourne bridges.

On February 1, 2017, at the direction of Deputy Chief Balcom, Detective York entered Registration No. 136AB6 (the black Hyundai Tucson) as a Hot List registration number into the ALPR system. Once a license plate such as 136AB6 has been entered into the Hot List, the ALPR system can generate information as to when this particular license plate number travels to or from Cape Cod via the Sagamore or Bourne bridges. As an authorized user, Detective York

had the ability to generate a spreadsheet relating to any license plate entered onto the Hot List. At the direction of Deputy Chief Balcom, Detective York generated a spreadsheet relating to license plate 136AB6 (Exhibit #2). The spreadsheet for the dates December 1, 2016 through February 12, 2017 indicates that license plate 136AB6 made same-day round trips over the Bourne or Sagamore bridges on at least 21 separate dates. Also at the direction of Deputy Chief Balcom, Detective York entered the names of certain Barnstable Police detectives who were to be notified when an alert was recorded upon a hit detected by one of the bridge camera readers for license plate 136AB6.

The Brief Meetings Between the Defendants

On February 8, 2017, several Barnstable Police detectives received an alert from the ALPR system that license plate 136AB6 (the black Hyundai Tucson) had traveled over the Sagamore Bridge onto Cape Cod via Route 6. Shortly thereafter, Detectives Foley and Chevalier initiated surveillance of Whittemore's residence and observed Whittemore leave his residence in a grey Mercury sedan. The detectives followed Whittemore to Shallow Pond Road, Centerville, Massachusetts, a residential neighborhood that is in close proximity to Route 6.

At approximately 4:50 p.m., Sergeant Detective Butler observed at black Hyundai Tucson, operated by Jason McCarthy, exit Route 6 at Exit 6/Route 132 and enter the Burger King Mobil Service Center parking lot. Detective Butler observed McCarthy park in front of and enter the Mobil Mart convenience store. After a quick visit to the Mobil Mart convenience store, McCarthy re-entered the black Hyundai Tucson at approximately 4:55 p.m. From there, Detective Butler surveilled the black Hyundai Tucson to the area of Huckins Neck Road and Shallow Pond Road.

Detective Chevalier, who was on scene, observed the black Hyundai Tucson turn onto Shallow Pond Road, traveling to the end of that street where it was observed meeting up with the grey Mercury sedan driven by Whittemore Less than 30 seconds later, both the grey Mercury sedan and black Hyundai Tucson exited the neighborhood. McCarthy was observed driving in the direction of Route 6 and thereafter traveling off of the Cape. Whittemore was surveilled travelling back to his residence.

Sometime during the early afternoon of February 22, 2017, Barnstable Police detectives received an alert that license plate No. 136AB6 had traveled over the Sagamore Bridge coming onto Cape Cod via Route 6. Deputy Chief Balcom deployed about ten Barnstable Police detectives and officers and instructed them to set up surveillance at Exit 6/Route 132 on Route 6, as well as at Whittemore's residence. Other detectives were deployed to the vicinity of Shallow Pond Road, in Centerville, Massachusetts.

A short time later, detectives observed Whittemore leave his residence in his grey Mercury sedan and he was followed to the Shallow Pond Road location. A few minutes later, McCarthy was observed driving the black Hyundai Tucson, license plate No. 136AB6 turning from Exit 6/Route 132 from Route 6 onto Shoot Flying Hill Road. McCarthy was observed driving directly to the end of Shallow Pond Road and, after a brief 30 second meeting, both the grey Mercury sedan and the black Hyundai drove back towards Route 132.

Detectives using binoculars observed the meeting between Whittemore and McCarthy but did not see an actual exchange of objects, since they were approximately 150 yards away. Deputy Chief Balcom was continually apprised as to the location and activities of the vehicles driven by McCarthy and Whittemore. Believing that a drug transaction had taken place between

Whittemore and McCarthy, Deputy Chief Balcom ordered the officers under his command to stop both vehicles after they left the end of Shallow Pond Road.

The Vehicle Stops

As Whittemore was driving back towards his residence in Hyannis, he was stopped on Bearses Way by Detectives Foley and Chevalier. The detectives were in an unmarked police vehicle and they activated their blue lights to effectuate the motor vehicle stop. Whittemore was immediately ordered out of his grey Mercury sedan and placed in handcuffs. Detective Chevalier did not indicate that he had concerns for officer safety or that there was a threat to public safety at the time he ordered Whittemore to exit his vehicle.

Detective Chevalier immediately advised Whittemore of his Miranda rights, which he claimed he understood. Upon further questioning by Detective Chevalier, Whittemore admitted that he had just met "Jason" on Shallow Pond Road in order to pay him $500 for some marijuana that he had purchased on a prior occasion. Whittemore further advised Chevalier that he did not have any drugs on him or in his vehicle. Detective Chevalier conducted a pat down of Whittemore's outer clothing, which revealed that Whittemore had a hard, cylinder-like object tucked in the rear of his underwear. Detective Chevalier felt the outline of the object and determined that it was a "finger" of suspected heroin. Whittemore was transported to the Barnstable Police Department by other officers on scene in a marked police cruiser and the suspected "finger" of heroin was recovered in a private room located in the booking area.

Shortly after the Bearses Way motor vehicle stop of Whittemore, McCarthy was stopped by Detective York before he reached the on-ramp to Route 6 after leaving Shallow Pond Road. Detective York was in an unmarked police vehicle and he activated his blue lights to effectuate the motor vehicle stop. Detective York immediately ordered McCarthy out of his vehicle, placed

him in handcuffs, and advised him of his Miranda rights, which he claimed he understood. Shortly thereafter, several Barnstable police detectives and patrol officers in marked police cruisers arrived on scene to assist with the motor vehicle stop. Detective York did not indicate any concerns for officer safety or a threat to the public at large when he ordered McCarthy to exit his motor vehicle.

Detective Butler had a conversation with McCarthy, inquiring about his whereabouts, and McCarthy responded that he was from New Bedford and that his grandparents were buried in the National Cemetery. Detective Butler asked McCarthy if he had visited the cemetery today in Bourne, and he replied that he had not. Detective Butler asked McCarthy what his purpose was for coming all the way to Hyannis. McCarthy indicated that he and his girlfriend, Ms. Boucher, came to the Cape frequently and that they were interested in eating at a Longhorn Steakhouse restaurant on the Cape, and that he knows people in the area. Detective Butler informed McCarthy that there were no Longhorn Steakhouse restaurants on Cape Cod.

Detective Butler explained to McCarthy that he was involved in a narcotics investigation and that the Barnstable police had not stopped his car randomly. Detective Butler indicated to McCarthy that he felt he was being untruthful about his purpose for traveling to Hyannis and McCarthy replied, "I've done cases before" and "I've worked with the police before off-Cape." McCarthy agreed to be interviewed at the Barnstable Police Department, and was transported there by other Barnstable Police officers in a marked police cruiser.

The Interviews at the Police Station

McCarthy's Interview

McCarthy was interviewed at the Barnstable Police Department booking room area at approximately 4:06 pm on February 22, 2017 by Detectives Chevalier and Butler. This court has

reviewed the entire recorded audiovisual DVD of McCarthy's police interview (Ex. 7), as well as a transcript of this interview (Ex. 4B).

As McCarthy entered the interview room, he was handcuffed behind his back. Upon entering the interview room, Detective Chevalier moved the handcuffs to the front of McCarthy's waist. Before the detectives began to interview McCarthy, he was advised of his rights by Detective Butler. After being read his rights, McCarthy indicated that he understood his right to remain silent and his right to counsel, and signed and dated a Barnstable Police Department Miranda Rights and Waiver form. (Ex. 6). McCarthy appeared calm and did not appear to be unsteady on his feet or under the influence of drugs or alcohol. During the course of the interview, he was able to converse freely with Detectives Butler and Chevalier.

Detective Butler began the interview by asserting that McCarthy hadn't been arrested or "booked", and that he was being detained for questioning. Detective Butler informed McCarthy the police had been following him, knew he had been meeting with Brian (Whittemore), and were prepared to arrest him for narcotics offenses. During the course of the interview, McCarthy asked the detectives several times if he was being arrested, and the detectives responded that it was going to take some pretty good information for them to go to their supervisor to avoid McCarthy being arrested or charged that afternoon or evening. McCarthy responded by indicating that this was not his "first time" doing this, and further indicated that he could help the detectives but would take some time. The detectives questioned McCarthy about his "source," which McCarthy named "Pucho," his supplier. McCarthy further informed the police that he cooperated in a murder investigation in the past in New Bedford.

McCarthy continually told the detectives that he is not a "big dude." McCarthy indicated that he wanted to help the police but he would not assist them if he were being charged. The

detectives continued to question McCarthy about the number of times he met with Whittemore and/or Whittemore's son, Junior. McCarthy did not hesitate to answer the detectives' questions and did not appear to be coerced or forced to respond to any of the detectives' statements or questions throughout the entire interview.

McCarthy indicated that he had been meeting with Whittemore on several occasions, sometimes one or two times per week, to sell Whittemore "fingers" of heroin for $800, after purchasing them for $750. McCarthy admitted being on Skating Pond Road earlier in the day and indicated that he knew of the execution of the prior January, 2017 search warrant at Whittemore's residence where no drugs were found. During the course of the interview, $917 in U.S. currency and two cell phones were taken from his person. The interview concluded at 4:48 p.m. on February 22, 2017.

Whittemore's Interview

At approximately 9:35 pm on February 22, 2017, Whittemore was interviewed at the Barnstable Police Department booking room area by Detectives Foley and Chevalier. This court has reviewed the entire recorded audiovisual DVD of this interview. (Ex 5.).

As he entered the interview room, Whittemore was handed a candy bar by Detective Foley. Whittemore was advised of his *Miranda* rights by Detective Foley and after being read his rights, Whittemore indicated that he understood his right to remain silent and his right to counsel. Whittemore asked the detectives to retrieve his reading glasses so he could read the Barnstable Police Department Miranda Rights and Waiver form. With the aid of his reading glasses, Whittemore read the Miranda form, but declined to sign the waiver portion of the form stating he had "nothing to say." However, immediately thereafter, Whittemore began speaking with Detective Foley and Chevalier.

Whittemore's demeanor throughout the interview was calm and he spoke in conversational tones. He was able to speak freely with the detectives and did not appear to be under the influence of drugs or alcohol. He made eye contact with the detectives and responded to their questions without hesitation. Detectives Foley and Chevalier made no promises or threats to induce Whittemore to speak, and Whittemore's decision to speak freely with them during the 31 minute interview did not result from his will being overborne.

Whittemore told the detectives that he had met McCarthy through his son, Junior, and acknowledged he had been buying heroin from McCarthy for the last year. Whittemore stated he had been buying "sticks" of heroin from McCarthy and that McCarthy was charging him $600.00 per "stick." Whittemore told the detectives he usually received a text message from McCarthy indicating he was making a trip to Cape Cod and asking if Whittemore "needed to see" him. Whittemore told the detectives that McCarthy chose the meeting spot on Shallow Pond Road after the search warrant of Whittemore's residence was conducted in January, 2017. Whittemore's interview with the detectives concluded at 10:06 pm on February 22, 2017.

Pretrial Discovery of ALPR System Data

In response to a discovery request from defense counsel in September, 2018, Detective York queried the ALPR system and discovered that information regarding license plate No. 136AB6 was no longer available, as the one-year retention period from the defendant's arrest date of February 22, 2017 had expired. Detective York was able to have the Barnstable Police Information Tecnology Division query the Barnstable Police Department's email server. The query found copies of emails indicating that Alerts from the ALPR system had been generated to designated police officers in February, 2017. Detective York printed copies of these emails and provided them to the District Attorney's office. (Exhibit #3). These Alerts are in the form of

both a printout of license plate No. 136AB6, indicating the time and lane of travel over either the Sagamore or Bourne bridges on various dates. The Alert printouts also contain a photo image of license plate No. 136AB6 and a photo of the rear portion of the vehicle. The Alerts recovered from the email server do not represent all of the alerts that were sent to the Barnstable Police during the course of the investigation. Approximately 12 Alerts were recovered out of numerous "hits" on 21 separate dates, as reflected in the spreadsheet generated by Detective York. (Ex. 2).

RULINGS OF LAW

McCarthy moves, Whittemore joining, for suppression of nearly all of the evidence obtained in the course of this investigation, on several grounds. The first, and most novel, argument is that the investigators were required to obtain either a search warrant under art. 14 and the Fourth Amendment, or a court order supported by reasonable suspicion, before obtaining ALPR "Hot List" notifications for McCarthy's vehicle. Next, the defendants argue that the February 22, 2017 vehicle stops, and subsequent exit orders, were not supported by reasonable suspicion or probable cause. Further, the defendants argue that they were taken into custody immediately after the exit orders, without probable cause, and that the subsequent pat-frisks or searches of their persons, and searches of their vehicles, were therefore illegal. As a result, the defendants seek to suppress all physical evidence collected from their persons and vehicles, as well as their statements at the scenes of the vehicle stops, as fruit of the poisonous tree tainted by the illegal stops, arrests, and searches. Lastly, the defendants argue that they were seized commensurate with arrest prior to their transport to the police station, and that therefore any recorded statements made at the station were in violation of Miranda rights and/or involuntary, and should be likewise suppressed. The court will address each of these arguments in turn.

I. ALPR System Data

The defendants seek to suppress on both constitutional and statutory grounds the ALPR system data showing the movements of McCarthy's vehicle across the Cape Cod bridges for a period of approximately two and one-half months, and any evidence arising therefrom.[3] The constitutional and statutory claims are both novel issues of first impression.

A. Constitutional Search Warrant Requirement

The defendants argue that the prolonged use of the ALPR system constituted tracking of McCarthy's movements in a fashion similar to historical cellular site location information ("CSLI"), such that a warrant supported by probable cause was required by art. 14 and/or the Fourth Amendment. There have been significant developments over the last five years in the application of constitutional protections to emerging ubiquitous location technology: in *Commonwealth* v. *Augustine*, 467 Mass. 230 (2014), the S.J.C. held that a person has a reasonable expectation of privacy in historical CSLI, such that art. 14 requires a search warrant supported by probable cause to obtain this information for a period of two weeks or more; in *Carpenter* v. *United States*, 138 S.Ct. 2206 (2018), the United States Supreme Court adopted similar reasoning, holding that the Fourth Amendment requires a search warrant supported by probable cause to obtain this information for a period of one week or more.

The defendants urge this court to expand such precedent to require a warrant to use ALPR systems to identify a pattern of travel by vehicles over an extended period of time, on the grounds that "individuals have a reasonable expectation of privacy in the whole of their physical movements." See *Carpenter*, 138 S.Ct. at 2218. The Commonwealth opposes, arguing that the

[3] The defendants seek to suppress all evidence collected after police received the ALPR Alerts about McCarthy's vehicle, including "[a]ll observations made of [the defendants] on February 22, 2017, by the Barnstable Police Department", physical evidence collected from the defendants' persons and vehicles, and all statements by the defendants to police.

ALPR system merely automates visual observation of a vehicle's license plate at a particular public location, conventional plain-view information in which the defendant cannot have a reasonable expectation of privacy. See *Commonwealth* v. *Starr*, 55 Mass. App. Ct. 590, 590 (2002) (under Fourth Amendment, "the operator of a motor vehicle has no reasonable expectation of privacy in a number plate that is required by law to be displayed conspicuously on that vehicle.") (internal quotations and references omitted).

The Commonwealth is on stronger footing than the defendants: unlike CSLI, which relies on invisible digital communications with private, proprietary cellular towers, the ALPR Hits and Alerts notified police of the very same information which could have been collected by merely observing the exterior of vehicles travelling over two public bridges. The fact that such information was collected through automated cameras, image-processing software, and a computer notification system, instead of through an officer's on-location visual surveillance, does not change the nature of McCarthy's privacy interest. See *Augustine*, 467 Mass. at 252 ("There is no real question that the government, without securing a warrant, may use electronic devices to monitor an individual's movements in public to the extent that the same result could be achieved through visual surveillance.").

Moreover, unlike the CSLI at issue in *Augustine* and *Carpenter* which cataloged several months of an "all-encompassing record of the [individual's] whereabouts," the ALPR Hot List was only used here to gather information about the movements of McCarthy's vehicle at two fixed points: the Bourne and Sagamore Bridges. Cf. *Carpenter*, 138 S.Ct. at 2218 (distinguishing CSLI from GPS vehicle monitoring, because "individuals regularly leave their vehicles" which have "little capacity for escaping public scrutiny", but individuals "compulsively carry cell phones with them all the time" such that CSLI "tracks nearly exactly

the movements of [the device's] owner."). Perhaps the defendants' argument would be stronger if the ALPR Hot List was set to issue an Alert every time McCarthy's vehicle passed any of the ALPR cameras installed at a multitude of locations statewide, such that ALPR systems could constructively "monitor and catalogue every single movement of an individual's car for a very long period." Cf. *United States* v. *Jones*, 565 U.S. 400, 430 (2012) (use of GPS device attached to vehicle to track vehicle's movements on public streets was search within meaning of Fourth Amendment). But such a scenario is not in keeping with the facts before this court, where only two fixed locations were monitored: there is no present reality supporting the defendants' attempt to summon a looming specter of "tireless and absolute surveillance" of vehicles by ALPR systems.[4] Cf. *Carpenter*, 138 S.Ct. at 2218. For those reasons, the court declines to suppress the ALPR system data, or any evidence arising therefrom, as acquired through an illegal search within the meaning of either the Fourth Amendment or art. 14.

B. Statutory Court Order Requirement

The defendants also argue that ALPR system data falls within the scope of 18 U.S.C. §§ 2701-2712, the Federal Stored Communications Act (SCA), and 18 U.S.C. §§ 2510-2522, the Federal Electronic Communications Privacy Act (ECPA), such that investigators were required to obtain a court order supported by a finding of reasonable suspicion before accessing this information. The defendants have not identified any case law applying the SCA or ECPA to ALPR system data, and rely solely on the statutory language.

[4] Likewise, the record evidence does not comport with the defendant's argument that the policy for ALPR data use and retention is either non-existent or arbitrarily adopted, such that the government's ALPR evidence in this case should be suppressed under art. 14 or the Fourth Amendment.

1. Stored Communications Act

Although the defendants do not specify any particular section of the SCA as supporting their arguments, the reasonable suspicion requirement to which the defendants allude is found in § 2703(d). At the time police received ALPR Alerts for McCarthy's vehicle, § 2703(d) of the SCA allowed a court of competent jurisdiction to issue an order requiring "a provider of electronic communication service" or a "provider of remote computing service" to produce "the contents of a wire or electronic communication" to a governmental entity if the government establishes that "specific and articulable facts" show "reasonable grounds to believe" that the records "are relevant and material to an ongoing criminal investigation."[5] The defendants argue that the storage of digital license plate photographs within the ALPR system, and the communication of those images to investigators in Alerts, constitutes an "electronic communication" and "remote computing service" for the purposes of the statute.

However, this interpretation finds no support within the language of the statute. Section 2710 defines "remote computing service" as "the provision *to the public* of computer storage or processing services by means of an electronic communications system." (emphasis added). The ALPR system maintained by EOPPS provides no services to the public, and is only accessible to select law enforcement officers for official business purposes. As such, this court cannot reasonably interpret ALPR system data as falling within the §§ 2703(b), (c) and (d) prohibition on government access to "wire or electronic communications in a remote computing service", and recordings concerning same, without a court order.

[5] Section 2703 was amended effective February 1, 2019, to require a warrant for records of "the contents of a wire or electronic communication" from "a provider of electronic communication service," in reflection of the United States Supreme Court's holding in *Carpenter* that individuals have a Fourth Amendment privacy right in CSLI of one week in duration. 18 U.S.C. §§ 2703(a), (d) (2019).

Similarly, although the SCA does not provide an explicit definition of the term "electronic communications" as used in §2703, it is clear from the surrounding language that the statute contemplates such "communications" as being held by a "provider of electronic communication service" with regard to "a subscriber to or customer of such service." McCarthy is not a "customer" or "subscriber" of the EOPPS ALPR system, nor does EOPPS itself provide a communications service, although ALPR Alerts are transmitted to the cell phones or computers of individual police investigators by third-party telecommunication service providers. Accordingly, it is unreasonable to interpret ALPR system data as falling within the §§ 2703(a), (c) and (d) prohibition on government access to "wire or electronic communications in electronic storage," and records concerning same, without a court order.

2. Electronic Communications Privacy Act

The defendants next argue that the ALPR images and Alerts constituted "intercepted" "wire or electronic communications" which cannot be used as evidence in court, unless the government first obtains a court order or meets other requirements under the ECPA. See 18 U.S.C. §§ 2511(1)-(2)(ii), 2515, 2516(2), 2517. The defendants have not presented any case law applying the ECPA to ALPR systems. Instead, at hearing, the defendants directed this court to the statutory definitions of the terms "wire communication," "intercept," "electronic communication," "electronic communications system," "electronic communication service," and "electronic storage." 18 U.S.C. §§ 2510(1), (4), (12), (14), (15), (17). These definitions provide no support to the defendants' position.

It is clear that the ALPR system does not produce any form of "wire communication" as defined by the statute: there is no allegation that the system makes use of any technology relating to the sense of hearing, and thus it cannot fall within a definition which is limited to "any *aural*

transmission . . .". 18 U.S.C. §§ 2510(1) (emphasis added). A closer match to the type of data produced by an ALPR system is found in the definition of "electronic communication," which includes "any transfer of . . . images . . . transmitted . . . by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce . . .". 18 U.S.C. §§ 2510(12).

However, not all "electronic communication[s]" are governed by the ECPA; the statute concerns only the disclosure or use of "*intercepted* . . . electronic communications." 18 U.S.C. §§ 2511, 2516-2518 (emphasis added). The term "intercept" is defined as "the aural or other acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device." 18 U.S.C. §§ 2510(4). Importantly, the statutory definition of "electronic, mechanical, or other device" explicitly *excludes* "any telephone or telegraph instrument, equipment or facility, or any component thereof . . . being used by . . . an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. §§ 2510(5).

Here, the ALPR system was constructed by government agencies to transmit images of its own making to authorized law enforcement officers in the course of their investigations into vehicles on the Hot List. In such a system, the newly-created images and Alerts reach only the intended law enforcement users, and thus are not "intercepted electronic communications" under any rational interpretation of the ECPA. Accordingly, the Barnstable police did not violate 18 U.S.C. § 2511 or §§ 2517-2518 by creating and using the ALPR Alerts on McCarthy's vehicle without authorization for interception and disclosure under the ECPA. For that reason, as well as those articulated above with respect to the SCA, the defendants' motion to suppress the ALPR system data, or any evidence arising therefrom, as required by federal statute, must be **DENIED**.

II. February 22, 2017 Vehicle Stops and Arrests

Next, the defendants challenge the constitutionality of the twin vehicle stops performed by Barnstable police on February 22, 2017, after officers observed a brief interaction between the defendants on Shallow Pond Road. The defendants argue that officers did not have a search warrant for their persons or vehicles, lacked probable cause to arrest, and lacked reasonable suspicion to order them to exit their vehicles after the stop. In the defendants' view, art. 14 and the Fourth Amendment require suppression of the evidence obtained by police thereafter, including their statements and items found on their persons.[6]

The court credits the defendants' arguments that police effectuated a warrantless arrest at the time the defendants were ordered out of their vehicles and placed in handcuffs. In determining if an encounter "was an arrest or merely a stop," the court considers "the degree to which the defendant's movement is restrained, the degree of force used by the police, and the extent of the intrusion." *Commonwealth* v. *Willis*, 415 Mass. 814, 819 (1993) (internal quotations omitted). "Specific factors include the length of the encounter, the nature of the inquiry, the possibility of flight, and, most important, the danger to the safety of the officers or the public or both. *Id.* at 820 (internal citations omitted). The subjective understanding of the officers and defendants does not control this determination. *Commonwealth* v. *Powell*, 459 Mass. 572, 580 (2011).

Here, the officers used force to stop the defendants: they used emergency lights to pull the defendants over, immediately ordered the defendants to exit their vehicles, and placed the defendants in handcuffs. The officers' testimony expressed no concern for the safety of

[6] McCarthy's motion to suppress argues that his vehicle was illegally searched, but does not seek to suppress any evidence as a result of that search. The record does not reflect the seizure of any evidence from the defendants' vehicles.

themselves or the public at the time they ordered the defendants out of their vehicles or physically restrained them. Cf. *Willis*, 415 Mass. at 820-821 (stop of defendant using drawn weapons not arrest where officers had reasonable fear that defendant was armed and dangerous). Accordingly, the force used to restrain and search the defendants constituted an arrest, regardless of any statements by officers to the defendants denying that they were under arrest.

However, such a warrantless arrest only violates art. 14 and the Fourth Amendment to the extent that it was unsupported by probable cause that the defendants had committed or were committing a felony. *Commonwealth* v. *Harris*, 11 Mass. App. Ct. 165, 168 (1981). The court rejects the defendants' contention that there was no probable cause at the time of the vehicle stop. To the contrary, investigators possessed ALPR records illustrating a pattern of frequent, brief trips on to Cape Cod by McCarthy's vehicle over the course of several weeks, as well as visual observation of the vehicle visiting Whittemore's residence and meeting briefly with Whittemore's vehicle in a secluded area on Shallow Pond Road. Taken in conjunction with controlled buys of narcotics from Whittemore's residence and the defendants' multiple prior convictions for narcotics offenses, the officers had probable cause to believe that McCarthy was supplying heroin to Whittemore several times per week, enabling Whittemore to resell it locally. Cf. *Commonwealth* v. *Levy*, 459 Mass. 1010, 1011-1012 (2011) (probable cause may be present where suspected drug transaction observed without actually witnessing object exchange, if officers also knew parties had history with illegal drugs). Accordingly, this court finds that the defendants' arrests at the time of the vehicle stops were supported by probable cause as required by art. 14 and the Fourth Amendment.

III. Searches Incident to Arrest

Having found that the defendants were properly under arrest, the court continues on to the defendants' arguments regarding the suppression of evidence seized from their persons after transportation to the police station. Officers are permitted to search, contemporaneous to a lawful arrest, the defendants' persons for weapons, instruments of escape, and evidence of a crime which the defendants could conceal or destroy.[7] *Commonwealth* v. *Phifer*, 463 Mass. 790, 793-794 (2012).

Officers were well within the scope of a search incident to arresting Whittemore for narcotics distribution when they performed a pat-down of Whittemore's person at the scene of the vehicle stop, noting a hard, cylindrical object tucked in the rear of his underwear, and then later removed the item from Whittemore's person in a private room at the station.[8] Similarly, although officers did not seize cellphones and currency from McCarthy until he was later interviewed at the police station, the search of his person was lawful because it was confined to the items which had been on his person at the time of his arrest at the scene of the motor vehicle stop. See *Commonwealth* v. *Phifer*, 463 Mass. 790, 797 n.9 (2012) ("The validity of the search [of an object on the defendant's person] does not turn on whether it was conducted at the scene of the defendant's arrest or at the police station during booking.").

For that reason, the court finds that the physical evidence was lawfully seized from the defendants incident to their lawful arrest for narcotics distribution and/or possession of narcotics

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[7] The record does not indicate that any evidence was seized from the defendants' vehicles, as opposed to their persons. However, the court notes that the warrantless search of a motor vehicle's passenger compartment, and any containers therein, incident to the lawful arrest of a recent occupant is permissible to the extent that it is "reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Arizona* v. *Gant*, 556 U.S. 332, 343-344 (2009). Such a search is lawful even where the defendant has been removed from the vehicle and physically restrained before the vehicle search is conducted. *Commonwealth* v. *Lelos*, 61 Mass. App. Ct. 626, 630-631 (2004).

[8] After the object was seized at the station, it was revealed to be a bag of powder, presumably an illicit substance.

with intent to distribute. The defendants' motion must be **DENIED** as to the contraband found on Whittemore's person, as well as McCarthy's cell phones and currency.

IV. Statements to Police

Next, the court addresses the defendants' arguments regarding the suppression of their statements to police as in violation of Miranda rights and art. 12. The defendants argue that any waiver of Miranda rights was ineffective, and all statements were involuntary, due to the officers' repeated assurances that the defendants were only "arrestable" and/or "detained but not under arrest."[9]

To address the defendants' claims of Miranda and art. 12 violations, this court must first determine if such rights had attached at the time of their various statements, both on-scene and at the police station. *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966); *Commonwealth* v. *Mavredakis*, 430 Mass. 848, 859-860 (2000) (art. 12 rights similar to Miranda, with additional right to be advised of attorney's arrival during questioning). Such rights, including the right to remain silent, attach only when an individual is subjected to state interrogation while in custody, reflecting "'that the danger of coercion results from the interaction of custody and official interrogation.'" *Commonwealth* v. *Larkin*, 429 Mass. 426, 432 (1999), quoting *Illinois* v. *Perkins*, 496 U.S. 292, 297 (1990).

Here, the circumstances under which the defendants were ordered to exit their vehicles, placed in handcuffs, detained at the scene, and then taken to the police station in marked cruisers, are sufficient to prove that all statements to police, from the vehicle stops onward, were custodial. *Commonwealth* v. *Damiano*, 422 Mass. 10, 13 (1996) (physical restraint of defendant

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[9] Whittemore makes no explicit arguments as to reasons his statements to police should be suppressed. This court assumes that he adopts by extension the arguments regarding Miranda waiver and voluntariness that are set out in McCarthy's memorandum. However, Whittemore has not submitted any evidence, through testimony or affidavit, that he was told he was not under arrest; no such statements are present in his recorded interview.

at roadside was circumstance under which no reasonable person would believe that they were free to leave). Further, the officers' questioning of the defendants, both on-scene and at the station, was objectively "designed to elicit an incriminating response," and thus the exchanges between the defendants and police were at all times custodial interrogations. See *Commonwealth* v. *Rubro*, 27 Mass. App. Ct. 506, 512 (1989) (internal quotations and citations omitted). Thus, the defendants have met their initial burden to demonstrate custodial interrogation, and the burden now shifts to the Commonwealth to prove "a knowing, intelligent, voluntary waiver of Miranda rights . . . [and] that the statements were voluntarily made." *Commonwealth* v. *Murphy*, 442 Mass. 485, 492 (2004).

"Although the voluntariness of a Miranda waiver and the voluntariness of a particular statement made during custodial interrogation are separate and distinct issues, the test for both is essentially the same." *Commonwealth* v. *Newson*, 471 Mass. 222, 229 (2011) (internal quotations omitted). "The test for voluntariness is whether, in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act . . . Under this totality of the circumstances test, [the court] consider[s] all of the relevant circumstances surrounding the interrogation and the individual characteristics and conduct of the defendant," including "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings." *Commonwealth* v. *Tremblay*, 460 Mass. 199, 207 (2011) (internal quotations and citations omitted).

A. McCarthy's Statements

McCarthy was advised of Miranda rights at the scene of the vehicle stop, immediately after he and his passenger were ordered out of the Hyundai Tucson and placed in handcuffs, and before he made any statements to police. This court credits the officers' testimony that the Miranda rights were communicated carefully and accurately to McCarthy at that time, and that McCarthy orally acknowledged that he understood those rights. This court further finds that McCarthy had sufficient intelligence and prior experience with the legal system to understand the standard Miranda warning given to him, and was not impaired in any fashion at that time. Lastly, the court credits the officers' testimony as to their conduct and demeanor during on-scene questioning, finding that their interactions with McCarthy, while custodial, were measured and conversational.

Similarly, McCarthy was advised of his Miranda rights for a second time at the police station, before detectives questioned him. This court finds from the recording and transcript that McCarthy understood his rights, and was not impaired in any fashion at the time that he executed the waiver form. As with the interaction on-scene, the detectives' demeanor at the police station was non-threatening, calm, and conversational.

Thus, the sole issue for this court to address is whether McCarthy's statements and Miranda waivers were rendered involuntary by the detectives' claims that the defendant was "not under arrest," and suggestions that a future arrest might possibly be avoided by providing information to police. McCarthy argues that these statements were deceitful trickery which overcame his will to remain silent, citing to *Commonwealth* v. *Newson*, 471 Mass. 222 (2015).

McCarthy represents that the *Newson* court held that a false statement by an interviewing officer denying that the defendant was under arrest, was an instance of deceit or trickery

supporting a finding that the defendant's subsequent statements were involuntary. To the contrary, the *Newson* court declined to reach that issue. *Id.* at 230. Instead, the Court concluded that the interviewing officer's representations regarding the defendant's arrest status did not render the defendant's statements involuntary, even if the Court were to *assume* that the representations had constituted an instance of deceit and trickery. *Id.* Indeed, the Court went on to note that even the use of clearly false statements and minimization techniques by interviewing officers does not "necessarily compel suppression of the confession or admission," and is but one of several factors "to be considered in a totality of the circumstances analysis." *Id.*

As in *Newson*, it is not necessary for this court to decide whether the detectives' denials that McCarthy was under arrest, and their suggestions that he might avoid arrest through his willingness to provide information, were instances of deceit and/or trickery. *Id.* It is sufficient to conclude that even if the detectives' claims were found to be a deliberate strategy to deceive or trick the defendant, the totality of the circumstances of McCarthy's police interactions were such that any deceptive strategy did not overbear McCarthy's will regarding his waiver and statements. See *Tremblay*, 460 Mass. at 208 ("In those cases where the use of a false statement is the *only* factor pointing in the direction of involuntariness, it will not ordinarily result in suppression . . .)" (internal quotations omitted).

McCarthy was not misled as to the severity of his situation: on scene, McCarthy was told that he was stopped as part of a narcotics investigation, and placed in handcuffs; and at the station, McCarthy remained in handcuffs, was informed police knew of his meetings with Whittemore, and was told that it would take some "pretty good" information to avoid arrest for distributing the narcotics seized from Whittemore. The detectives' remarks in this case, like

those in *Newson*, served to emphasize, not minimize, the seriousness of the crime under investigation and McCarthy's suspected conduct. See *Newson*, 471 Mass. at 231.

Moreover, McCarthy had extensive prior experience in the criminal justice system, and was the initiator of the discussion of leniency. See *Tremblay*, 460 Mass. at 207. McCarthy volunteered his past cooperation with police in other jurisdictions as soon as Detective Butler informed him of the narcotics investigation at the scene of the vehicle stop, and repeatedly referred to this past cooperation during his interview at the station. Although McCarthy stated that he would not assist police if he was being charged, this statement reflects McCarthy's awareness of his exposure and attempt to bargain for leniency similar to his prior arrangements.

As such, the detectives' statements regarding McCarthy being "detained", but "not arrested," and their suggestions that he might be able to avoid arrest by providing information, are substantially distinguishable from the circumstances in *Commwonwealth* v. *Baye*, 462 Mass. 246 (2012), upon which McCarthy also relies. Although the officer in *Baye* did tell that the defendant that he was free to leave, the Court did not resolve the issue of whether he was actually in custody, and thus whether the statement was false. *Id.* at 255. As such, the Court's finding of involuntariness did not turn the investigating officers' use of deception regarding arrest status. Instead, the Court's analysis rested on the totality the "multiple problematic tactics . . . used [by officers] throughout the nearly ten-hour interrogation," which included minimizing the legal gravity of the defendant's crimes, pressure to confess "now or never," mischaracterizing the law of murder, and actively dissuading the defendant from consulting an attorney. *Id.* at 257.

In contrast, the detectives' denial that McCarthy was under arrest and suggestions that an arrest might be avoided through cooperation occurred in the context of relatively brief,

conversational interviews where the defendant himself raised discussions of leniency and was clearly aware of the seriousness his legal exposure; there were no other indicia of coercion. See *Tremblay*, 460 Mass. at 208. From the totality of these circumstances, the court finds that the Commonwealth has proven beyond a reasonable doubt that McCarthy's will was not overborne, and that all of his statements and Miranda waivers were knowing, intelligent, and voluntary. See *Murphy*, 442 Mass. at 492. McCarthy's motion must be **DENIED** as to his statements.

B. Whittemore's Statements

Like McCarthy, Whittemore was immediately given Miranda warnings at the scene of the vehicle stop, before he made any statements to police. Again, this court credits the officers' testimony that the Miranda rights were communicated carefully and accurately to Whittemore at that time, and that he orally acknowledged that he understood those rights. This court further finds that Whittemore had sufficient intelligence and prior experience with the legal system to understand the standard Miranda warning given to him, and was not impaired in any fashion at that time. Lastly, the court credits the officers' testimony as to their conduct and demeanor during on-scene questioning, finding that their interactions with Whittemore, while custodial, were measured and conversational. Importantly, Whittemore has produced no evidence that any officer at the scene of the vehicle stop discussed his arrest status with him, or engaged in any form of deception, trickery, or coercion at that time. Accordingly, the Commonwealth has proven beyond a reasonable doubt that Whittemore's on-scene Miranda waiver and statements were knowing, intelligent, and voluntary. See *Murphy*, 442 Mass. at 494.

At the police station, Whittemore was advised of his Miranda rights for a second time before Detectives Foley and Chevalier conducted the recorded interview. This court finds from Whittemore's demeanor, speech, use of his reading glasses, and prior experience with the

criminal justice system, that he fully understood the Miranda warnings and was not impaired in any fashion at that time. As with the interaction on-scene, the detectives' demeanor at the police station was non-threatening, calm, and conversational. The detectives did not discuss Whittemore's arrest status, or any possibility of avoiding arrest by providing information.

Thus, the only real question as to voluntariness and effective waiver arises from Whittemore's statement at the beginning of the interview that he "had nothing to say," as he refused to sign the Miranda acknowledgment and waiver form. However, this statement was immediately followed by Whittemore continuing to speak, without any intervening response or encouragement by the detectives. Even assuming Whittemore's initial statement was a clear invocation of his right to silence, see *Commonwealth* v. *Clarke*, 461 Mass. 336, 350-351 (2012), there is no involuntariness or violation of Miranda rights if a defendant makes statements after invoking this right at his own initiative and in the absence of any continued questioning by police, *Commonwealth* v. *Caputo*, 439 Mass. 153, 160-161 (2003).

Accordingly, the totality of the circumstances of the interrogation, including the setting, tone, access to food, and lack of any questioning between Whittemore's claim he had "nothing to say" and his immediately following statements, is proof beyond a reasonable doubt that Whittemore's statements at the station were voluntary and made in the absence of any violation of Miranda rights. See *Murphy*, 442 Mass. at 494. Whittemore's motion must be **DENIED** as to his statements to police.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendants' motions to suppress statements, physical evidence seized from their persons, and ALPR system data be **DENIED**.

Robert C. Rufo
Justice of the Superior Court

Dated: March 11, 2019